

IN THE MATTER OF THE  
ESTATE OF MADELINE BONE WELLS

IBIA 87-3-Q

Decided April 1, 1987

Interlocutory certification from Administrative Law Judge Robert C. Snashall concerning the authority of a Bureau of Indian Affairs agency Superintendent to approve disbursements from an Indian estate under 25 CFR 115.11(b).

Interlocutory certification decided; case remanded.

1. Bureau of Indian Affairs: Generally--Indian Probate: Generally

Confusion and potentially conflicting decisions would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

2. Bureau of Indian Affairs: Generally--Indian Probate: Claim  
Against Estate: Generally

Bureau of Indian Affairs agency Superintendents are not empowered by 25 CFR 115.11(b) to authorize disbursements from the Individual Indian Money account of a deceased Indian for funeral expenses without the approval of an Administrative Law Judge (Indian Probate).

APPEARANCES: Michael E. Draais, Esq. , Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Superintendent.

OPINION BY ADMINISTRATIVE JUDGE LYNN

On October 27, 1986, the Board of Indian Appeals (Board) received an interlocutory certification under 43 CFR 4.28 from Administrative Law Judge Robert C. Snashall. The question certified concerned the authority of a Bureau of Indian Affairs (BIA) agency Superintendent to approve disbursements for funeral expenses from an estate Individual Indian Money (IIM) account under 25 CFR 115.11(b), in view of the general authority of Administrative Law Judges in probate proceedings as set forth in 43 CFR Part 4, Subpart D, and specifically 43 CFR 4.202, 4.240, 4.250, and 4.251. For the reasons discussed below, the Board holds that BIA Superintendents are not

empowered by 25 CFR 115.11(b) to authorize disbursements for funeral expenses without the approval of the Administrative Law Judge.

### Background

Madeline Bone Wells (decedent), No. 101-N-4367 of the Colville Indian Agency, Washington State, died on August 25, 1984. Judge Snashall held a hearing to probate decedent's Indian trust estate on March 27 and December 3, 1985, and May 15, 1986. As the result of a compromise settlement of decedent's estate, her brother and sister, Joseph Bone and Sarah Bone McCraigie, each received \$5,000, with the remainder of the estate going to Eva Marie Nelson Newsom, the principal beneficiary under decedent's last will and testament. Judge Snashall entered his final order in decedent's estate on September 10, 1986.

On August 28, 1984, 3 days after decedent's death, the Colville Agency Superintendent (Superintendent), BIA, authorized disbursement of \$1,000 from decedent's IIM account for funeral-related expenses. The Superintendent states this money was requested by Sarah McCraigie; Lottie Hanway, Director of Social Services for the Colville Tribe; Nancy Desautel, daughter of Sarah McCraigie; Andy Joseph, a member of the Colville Business Council; and Don Bleakney, BIA agency Community Services Director. The Superintendent believed all of the expenses related to him were legitimate and valid funeral-related expenses, and would guarantee decedent the traditional Colville ceremony, wake, and burial she had desired. He, therefore, authorized disbursement of \$1,000 from decedent's IIM account under authority of 25 CFR 115.11(b).

Following Judge Snashall's certification to the Board, the Superintendent was given an opportunity to explain his position. The Board received his opening brief on December 22, 1986. No other briefs were filed.

### Discussion and Conclusions

Before considering the specific question raised in this case, it is appropriate to review briefly the history of Indian probate within the Department. Prior to the creation of the Office of Hearings and Appeals (OHA) in 1970, Indian probate was conducted by BIA, with appellate review by the Office of the Solicitor. See, e.g., 25 CFR Part 15 (1958). When OHA was created, most Indian probate functions were transferred to it. <sup>1/</sup> The position now called Administrative Law Judge (Indian Probate) replaced the BIA probate examiner; the Board of Indian Appeals replaced the Office of

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<sup>1/</sup> Exceptions from OHA's probate authority are estates of members of the Five Civilized Tribes, which are probated through Oklahoma State courts (25 CFR Part 16 and legislation cited therein); estates of members of the Osage Tribe, whose wills continue to be approved by BIA (25 CFR Part 17); and intestate cases in which the deceased Indian left only trust personal property or cash with a value of less than \$1,000 (43 CFR 4.271). In addition, BIA remains responsible for providing information to the Administrative Law Judges concerning a deceased Indian's probable heirs (43 CFR 4.210) and trust or restricted real property (43 CFR 4.210, 4.272, and 4.273).

the Solicitor. Specific delegations of authority were made to OHA to enable it to carry out its probate functions. See 211 DM 13.3(b); 43 CFR 4.1(a), 4.1(b)(2). Rules governing the conduct of Indian probate proceedings were removed from BIA's regulations in 25 CFR Part 15 and placed in OHA's regulations in 43 CFR Part 4, Subpart D. 2/

The text of the present 25 CFR 115.11, under which the Superintendent argues he is empowered to authorize disbursements from an estate IIM account, has been essentially unchanged for many years. See, e.g., 25 CFR 104.10 (1958). The regulation provides:

Funds of a deceased Indian other than those of the Five Civilized Tribes may be disbursed (a) for the payment of obligations previously authorized, including authorized expenses of last illness; (b) for authorized funeral expenses; (c) for support of dependent members of the family of decedent in such amounts deemed necessary to avoid hardship and consistent with the value of the estate and the interest of probable heirs; (d) for necessary expenses to conserve the estate pending the completion of probate proceedings; and (e) for probate fees and claims allowed pursuant to Part 15 of this chapter.

The Superintendent argues that his interpretation of this regulation is supported by 25 CFR 115.8; 3/ various Federal Register statements made concerning amendments to the regulation; a September 20, 1960, memorandum from the Assistant Commissioner (Administration); and a May 7, 1985, memorandum from the Portland Area Director to the Deputy Assistant Secretary--Indian Affairs (Operations). As to the two memoranda, the Superintendent states each document concludes Superintendents are empowered by 25 CFR 115.11 to authorize funeral expense disbursements from a deceased Indian's IIM account. The Superintendent argues both of these memoranda are currently in force and constitute the interpretation of the Bureau of Indian Affairs with respect to this regulation, and are controlling as to the question of the disbursement made." 4/ Brief at

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2/ Part 15 continues to exist as a cross-reference to 43 CFR Part 4, Subpart D, and to 25 CFR Parts 16 and 17. See note 1, supra.

3/ Section 115.8 provides:

"Purchase orders may be issued only in emergencies upon the request of any account holder. The Secretary or his authorized representative may act in emergencies on behalf of an account holder who is unable to make a request because of illness or incapacity or, to meet expenses of last illness or funeral."

4/ In order for this interpretation to "control" the Board's decision, it would have to be embodied either in Departmental adjudicatory precedent or in a rule. Although the memoranda may, as argued by the Superintendent, constitute BIA's interpretation of the regulation, the issue raised is one of first impression before the Board or any other review authority outside BIA. It is not, therefore, embodied in adjudicatory precedent. Neither is the interpretation a rule, because it has not been adopted in accordance with the requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). See

The Board has thoroughly reviewed the documents submitted by the Superintendent in support of his position. It appears clear that when the regulation was written, it was intended to give Superintendents the authority here claimed. However, at that time, all probate authority (except appellate review) was with BIA, and the regulation merely constituted an allocation of different portions of that authority to different BIA officials.

As has already been discussed, most of BIA's probate authority was transferred to OHA in 1970. Because of that transfer, BIA deleted its probate regulations in 25 CFR Part 15. Section 115.11, which was a probate-related regulation, but not as obvious as the regulations in Part 15, was not amended to conform to the reallocation of probate authority. <sup>5/</sup> That section must now be read as in pari materia with the regulations in 43 CFR Part 4, Subpart D, as it was previously read as in pari materia with 25 CFR Part 15.

Several sections of 43 CFR Part 4, Subpart D, are relevant to this discussion. Section 4.202 states: "Administrative law judges shall \* \* \* allow or disallow creditor's claims against estates of deceased Indians." Section 4.240(b)(3) provides: "The administrative law judge shall decide the issues of fact and law involved in the proceedings and shall incorporate in his decision: \* \* \* Allowance or disallowance of claims against the estate." Sections 4.250-.251 establish a rather detailed procedure for determining creditor's claims and setting priorities for the payment of allowed claims. Section 4.251 specifically concerns priority of payment of claims for last illness and funeral expenses.

[1] Except in those instances previously identified, coordination of the trust or restricted assets of a deceased Indian and equitable treatment of all creditors is now placed within the responsibility of OHA's Administrative Law Judges by the Departmental Manual and the regulations. Obviously and as a practical matter, the Judge's ability to carry out this responsibility would be frustrated if other individuals could authorize disbursements of estate assets without regard to the regulatory provisions. As the Board noted in regard to a BIA administrative decision in Interim Ad Hoc Committee of the Karok Tribe v. Sacramento Area Director, 13 IBIA 76, 92 I.D. 46 (1985), confusion and potentially conflicting decisions would result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

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fn. 4 (continued)

Underwood v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 3, 93 I.D. 13 (1968); Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982). The interpretation has not even been placed in the BIA Manual, which was described by the Supreme Court as a BIA "internal-operations brochure" (Morton v. Ruiz, 415 U.S. 199, 235 (1974)), although the 1960 memorandum was placed in a September 1985 BIA Division of Real Estate Services publication entitled Probates: A Training Manual in Real Property Management.

<sup>5/</sup> The 1960 Assistant Commissioner's memorandum, upon which the Superintendent relies, pre-dates the transfer of probate authority to OHA. Similarly, all documents cited in the 1985 Area Director's memorandum pre-date the transfer.

When section 115.11, and similar sections, are read in conjunction with the authority delegated to OHA, it is apparent that by giving the regulation the interpretation urged by the Superintendent, probate authority that was specifically removed from BIA by the Secretary in creating OHA, would be restored without Secretarial approval, and two offices would be exercising simultaneous jurisdiction over the same persons and subject matter. The Board will not interpret a regulation in this manner unless there is no other way it can be read. Neither will it impute to BIA a desire to appropriate authority it no longer has. 6/

[2] The regulation can easily be read in another way which is consistent with the authority given to OHA. Nowhere in the regulations in either 25 CFR or 43 CFR is a BIA Superintendent specifically identified as an individual authorized to determine the validity of funeral expense claims. The only persons identified as having such authority are Administrative Law Judges (Indian Probate) and the Board on review of the decision of an Administrative Law Judge. Rather than construing section 115.11(b) as a grant of authority mentioned nowhere else, a more proper reading of the plain words of the section under the circumstances is that it allows a Superintendent to "disburse" funds from an estate IIM account after payment for funeral expenses has been "authorized" by the official with such authority. Therefore, the Board holds that section 115.11(b) authorizes BIA Superintendents to disburse funds from an estate IIM account upon order from an Administrative Law Judge both before and upon the entry of a final order in the estate. 7/

The Superintendent raises several issues justifying his action that should be noted. He suggests swift action was needed in order to ensure decedent would have the traditional services she desired. In making this argument the Superintendent contends decedent probably would not have received these services had the family been required to wait for Judge Snashall's final order. This argument suggests the Superintendent is making two improper assumptions: (1) that OHA's Administrative Law Judges are or would be insensitive to cultural needs and desires concerning funerals; and (2) that the Administrative Law Judges could and/or would take no action to release estate funds for funeral expenses before entry of a final order. The Superintendent does not state any grounds for an assumption that the Administrative Law Judges would not respond in a timely manner to a prehearing request for release of funds for funeral expenses. The Board is unwilling to make such an assumption.

The Superintendent also suggests his actions merely constituted the logical continuation of his trust responsibility to the decedent. Assuming arguendo that the disbursement of funds for a decedent's funeral is a trust responsibility issue, OHA's Administrative Law Judges share the duty imposed

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6/ In distinction, cf. 25 CFR 115.11(d) with 43 CFR 4.270, which specifically preserves the Superintendent's authority to take actions to conserve the estate pending entry of a final order.

7/ Nothing in this decision restricts the authority of a Superintendent to disbursements authorized by the decedent during his or her lifetime.

upon the Department to carry out the Federal trust responsibility to all Indians. Estate of Wesley Emmett Anton, 12 IBIA 139 (1984).

Finally, the Superintendent contends a decision holding that Superintendents lack this authority "will be of widespread significance to every BIA agency and Superintendent[,] \* \* \* would have widespread negative implications for the many families of deceased Indians in need of assistance in managing the funeral of a deceased[,] \* \* \* [and w]e are aware of no difficulties with respect to this existing process." Brief at 8. The Board has been informed by several of OHA's other Administrative Law Judges that the agency Superintendents in their areas do not authorize disbursements from an estate IIM account for funeral expenses without approval from the Judge. It is probably for this reason that no difficulties have arisen because of the interpretation. It is highly unlikely, however, that "widespread" problems will result from this decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board holds that 25 CFR 115.11(b) does not empower BIA Superintendents to authorize disbursements from the IIM account of a deceased Indian without the approval of the Administrative Law Judge (Indian Probate). This certified case is remanded to Judge Snashall for any further action necessary to effectuate this decision.

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Kathryn A. Lynn  
Administrative Judge

I concur:

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Anita Vogt  
Acting Chief Administrative Judge

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8/ Although this decision concerns only 25 CFR 115.11(b), the reasoning might easily apply to similar sections of 25 CFR.